No. 92-2056

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CALVIN J. HALL,

Petitioner

vs.

WILLIAM HARLAN, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE
EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a court invoking its inherent power to impose a monetary sanction against counsel must first find that the sanctioned attorney acted in bad faith.

II. Whether an attorney sanctioned for conduct occurring outside the presence of the trial judge is, absent exigent circumstances, entitled to notice and a hearing before being required to pay a fine.

LIST OF ALL PARTIES TO THE PROCEEDING

The plaintiffs in the action from which this petition arises were William Harlan and Genice Harlan, individually and in their capacities as natural guardians of Danielle Harlan, a minor. The defendant in that action was James S. Lewis, M.D. Calvin J. Hall was Lewis's attorney. Since no party to the action below was a corporation, there are no parent or subsidiary corporations to disclose.

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OPINIONS BELOW

On January 29, 1992, the United States District Court for the Eastern District of Arkansas entered a Memorandum Opinion and Order in which it, among other things, granted the plaintiffs' Motion to Prohibit Unauthorized *Ex Parte* Communications with Treating Physicians, and imposed two $2,500 sanctions on Petitioner. *Harlan v. Lewis*, 141 F.R.D. 107 (E.D. Ark. 1992). (Appendix at 20a.) Upon Petitioner's appeal, the United States Court of Appeals for the Eighth Circuit affirmed that order on January 12, 1993. *Harlan v. Lewis*, 982 F.2d 1255 (8th Cir. 1993). (Appendix at 1a.) On February 26, 1993, the Eighth Circuit, in an unreported opinion, denied both Petitioner's petition for rehearing and his suggestion of rehearing *en banc*. (Appendix at 36a.)

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on January 12, 1993; that court denied both the petition for rehearing and suggestion of rehearing *en banc* on February 26, 1993. This Court granted Petitioner's application for extension of time in which to file a petition for writ of certiorari on May 13, 1993. Since the time during which it might be filed expires on June 25, 1993, this petition is timely, and the Court has discretionary jurisdiction to consider this case pursuant to 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISION AND RULE

This case implicates the due process clause of the Fifth Amendment to the Constitution of the United States, which provides:

Criminal actions — Provisions concerning — Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

This case also involves the construction of Rule 3.4 of the Arkansas Model Rules of Professional Conduct, which provides:

Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Ark. Model R. Prof. Conduct, Rule 3.4.

STATEMENT OF THE CASE

William and Genice Harlan (Respondents) filed this medical malpractice action against James S. Lewis, M.D. (Lewis), invoking the diversity jurisdiction of the United States District Court for the Eastern District of Arkansas pursuant to 28 U.S.C. § 1332, and alleging in their complaint that Lewis was negligent in his care of their newborn daughter. Lewis's malpractice insurer retained Calvin J. Hall (Petitioner) to provide him with a defense.

Believing such meetings were permitted by the rules of evidence and civil procedure addressing the physician-patient privilege, Petitioner, without prior authorization from Respondents, had *ex parte* conversations during the pre-trial discovery period with several non-party physicians who treated Respondents' daughter. When Respondents learned of these meetings, they filed a motion (to which they attached deposition excerpts indicating that the conversations had occurred) alleging that Petitioner had violated the Arkansas physician-patient privilege and had instructed the physicians to refrain from speaking to Respondents' counsel in violation of the Arkansas Model Rules of Professional Conduct. They sought, among other things, their attorney's fees and costs in deposing the witnesses with whom Petitioner had spoken, and entry of an order preventing Petitioner from contacting non-party treating physicians and directing him to provide them with a summary of the dates and circumstances of all his prior meetings with non-party physicians. Petitioner admitted in his response that the meetings had occurred, but denied that he had instructed any potential witness to refrain from meeting with Respondents' attorney; he further argued that the meetings were not barred by the rules and that sanctions should not be imposed merely on the basis that the conversations had taken place. In reply, Respondents supplemented their motion with an affidavit from another physician regarding Petitioner's *ex parte* conversation with him. In neither their initial motion nor in their reply, however, did Respondents seek a fine against Petitioner.

The district court ruled that the Arkansas physician-patient privilege prohibits defense counsel's *ex parte* contacts with physicians who have treated the plaintiff, and ordered Petitioner to provide Respondents' counsel with all notes, records, transcripts, or recordings of his *ex parte* interviews with treating physicians. Holding solely on the basis of the evidence submitted by Respondents that Petitioner's actions violated Rule 3.4 of the Arkansas Model Rules of Professional Conduct, the district court further invoked its inherent power to fine Petitioner (i) $2,500 for allegedly suggesting to a non-party physician that Respondents were unlikely to prevail if he did not testify, and (ii) $2,500 for allegedly suggesting to another non-party physician that he refrain from talking informally with Respondents' counsel.

Upon Petitioner's interlocutory appeal, the Eighth Circuit affirmed, holding that the sanctions were properly imposed for Petitioner's violations of the physician-patient privilege and Model Rule 3.4. It further held that no finding of bad faith was required before the district court invoked its inherent power to sanction, and that no notice beyond Respondents' request for more severe sanctions than those imposed was required before the district court sanctioned Petitioner. Concurring specially, Judge Beam took the position that the district court erroneously based its order on the divergence between its construction of the privilege and that on which Petitioner relied.

The Eighth Circuit's interpretation of district courts' inherent power to sanction in this and subsequent cases places its construction of the bad faith standard in direct conflict with that of the Second, Sixth, and Ninth Circuits; this case therefore presents this Court with the occasion to resolve a conflict among the circuits. In addition, since the Eighth Circuit affirmed the district court's summary imposition of sanctions, it apparently approved the district court's failure to accord Petitioner the notice and hearing to which he was entitled under the due process clause of the Fifth Amendment. Granting the writ will consequently provide this Court with the opportunity to emphasize the importance of this constitutional right.

ARGUMENT

I. Whether a court invoking its inherent power to impose a monetary sanction against counsel must first find that the sanctioned attorney acted in bad faith.

An appreciation of the attorney's contribution to the trial process obviously undergirds this Court's explicit conclusion in *Roadway Express v. Piper*, 447 U.S. 752 (1980), that a trial court must find an attorney acted in bad faith before exercising its inherent power to sanction; there must be a "specific finding" that "counsel's conduct . . . constituted or was tantamount to bad faith." *Id.* at 767. *See also Chambers v. NASCO*, 111 S. Ct. 2123, 2135-36 (1991) (power to sanction tied to finding of bad faith). As the Ninth Circuit has recognized, *Zambrano v. City of Tustin*, 885 F.2d 1473 (9th Cir. 1989), this Court's holding in *Roadway* applies to all sanctions imposed pursuant to the inherent power, yet the courts below ignored that directive.[1]

The reluctance of the courts below to give full effect to the rule of *Roadway* is particularly puzzling since the authority to sanction has always been carefully circumscribed. The Constitution conditions the exercise of judicial power on compliance with procedures that prevent its intemperate or unprincipled use, and although such procedures are sometimes dismissed as mere technicalities, their observance ensures that courts exercise their inherent powers with the "restraint and discretion," *Roadway*, 447 U.S. at 764, necessary to preserve the "essential fairness" of our judicial system, *Sacher v. United States*, 343 U.S. 1, 28 (1952) (Frankfurter, J., dissenting).

It may be, of course, that the district court fell victim to the confusion an imprecise and indefinite standard like bad faith can engender, *see Chambers*, 111 S.Ct. 2123, 2145 (Kennedy, J.,

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[1] The Eighth Circuit in particular gave *Roadway* far too narrow a reading, concluding that it applies only to cases in which the sanction imposed is to shift attorneys fees. *Harlan v. Lewis*, 982 F.2d 1255, 1260(8th Cir. 1993) (Appendix at 8a).

dissenting),[2] apparently construing *Roadway* and *Chambers* as relieving it of the duty to make any finding at all. For its part, the Eighth Circuit has obviously concluded that the bad faith finding is not an essential component of the sanctioning process, since it now cites this case as one in which it "held that a showing of bad faith is not necessary to support a monetary sanction against counsel." *Dillon v. Nissan Motor Co.*, 986 F.2d 263, 267 (8th Cir. 1993) (citing *Harlan v. Lewis*, 982 F.2d 1255 (8th Cir. 1993)).

This holding puts the Eighth Circuit directly in conflict with at least three other courts of appeals, which have concluded that the finding of bad faith is necessary. *See Zambrano*, 885 F.2d at 1478 ("A specific finding of bad faith . . . must accompany the sanction order . . . ."); *Ray A. Scharer & Co. v. Plabell Rubber Prods.*, 858 F.2d 317, 321 (6th Cir. 1988) (inherent authority to impose sanctions where attorney found "to have acted in bad faith"); *Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986) (award under 28 U.S.C. § 1927 must be supported by bad faith finding "similar to that necessary to invoke the court's inherent power"), *cert. denied, sub nom. County of Suffolk v. Graseck*, 480 U.S. 918 (1987).[3]

Even were there no conflict among the circuits, the unprincipled imposition of punishment that results from the Eighth Circuit's refusal to require the finding of bad faith is incongruent with our legal tradition. It has long been established that courts do not have unlimited discretion to sanction, *see, e.g., Sacher*, 343 U.S. at 25 (Frankfurter, J., dissenting) (recognizing

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[2] It is, in fact, almost as if Justice Kennedy foresaw the decisions of the courts below, for he warned that the "standardless exercise" of the judicial power to sanction "can be applied to chill advocacy." 111 S. Ct. at 2145.

[3] In addition, two other courts of appeals have taken the position that the inherent power to sanction is applicable where an attorney has abused the judicial process, *see Hornbuckle v. Arco Oil & Gas*, 732 F.2d 1233, 1237 n.6 (5th Cir. 1984), *cert. denied*, 475 U.S. 1016 (1986); *Textor v. Board of Regents*, 711 F.2d 1387, 1395 (7th Cir. 1983), which may amount to a bad faith standard. In any event, it indicates an appreciation of the limitations on the inherent power conspicuously lacking from the Eighth Circuit's analysis.

both statutory and decisional limitations on inherent powers), but must temper their actions with moderation. *Roadway*, 447 U.S. at 764.

The resulting tension between a court's power to sanction and the Constitution's limits on that power colors any consideration of the issues here, for restrictions appropriate to the reach of any power must contain its exercise. *Sacher*, 343 U.S. at 24-25 (Frankfurter, J., dissenting). Thus, despite the inconvenience that may result from restrictions on judicial authority, *In re Oliver*, 333 U.S. 257, 280-81 (1948) (Rutledge, J., concurring), the Constitution guarantees that efficiency will yield to patience and reflection, even in the face of congested dockets and their attendant delays. *Business Guides v. Chromatic Comms. Enters.*, 498 U.S. 533, ____, 111 S. Ct. 922, 943 (1991) (Kennedy, J., dissenting).

The bad faith standard for attorney discipline is just such a guarantee, preventing the court's need to control the proceedings before it from overwhelming the attorney's right to engage in zealous advocacy. It embodies this Court's recognition that "[a]n independent judiciary and a vigorous, independent bar are both indispensable parts" of the system, *In re McConnell*, 370 U.S. 230, 236 (1962), which presupposes the attorney's freedom to espouse any reasoned position in advancing the client's interests.[4] Lawyers are expected to press their clients' claims, even when they appear "farfetched and untenable," *Sacher*, 343 U.S. at 9, and this Court has long recognized its obligation to protect attorneys performing that duty. *Id.* Should this change, the single-minded devotion to clients' positions that we expect of litigators will vanish. Fearful of becoming branded as unethical if they engage in zealous advocacy, trial lawyers will become over-cautious, concentrating as much on protecting

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[4] *Cf.* Ark. Model R. Prof. Conduct, Rule 3.1, comment (lawyer should "either . . . make a good faith argument on the merits . . . or . . . support the action taken by a good faith argument for an extension, modification or reversal of existing law"); Rule 3.3, comment ("The advocate's task is to present the client's case with persuasive force.").

themselves from the courts' power to sanction as on advancing their clients' interests.[5]

Even if *Roadway* and *Chambers* can be read to mean that sanctions are proper where, as here, the court's order includes no explicit finding of bad faith, such a rule would be irrelevant to this case. Whatever the basis for the sanctions, Petitioner acted in complete good faith by tailoring his behavior to the requirements of the Arkansas rules as he understood them. Particularly since another district judge has agreed with Petitioner's interpretation of the evidentiary rule at issue, *see King v. Ahrens*, 798 F. Supp. 1371 (W.D. Ark. 1992), *appeal docketed*, No. 92-2997 (8th Cir. Sept. 8, 1992), and even the district court recognized that Petitioner was sensitive to his ethical obligation to refrain from influencing the testimony of a physician who might be called as a witness, *Harlan v. Lewis*, 141 F.R.D. at 113 (Appendix at 30a), there can have been no bad faith here.[6]

In fact, if Judge Beam correctly characterized the sanctions as having been imposed — at least in part — because Petitioner disagreed with the trial judge about the scope and meaning of the applicable privilege, *Harlan v. Lewis*, 982 F.2d at 1265 (Appendix at 18a), the trial court unquestionably erred in invoking the inherent power. The primary purpose of that power is to preserve the authority of the court, *Chambers*, 111 S. Ct. at

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[5] Weighing only the financial effect of any sanctions imposed, as the district court did here, *Harlan v. Lewis*, 141 F.R.D. 107, 113 (E.D. Ark. 1992) (fines "paltry") (Appendix at 31a), tells less than half the story. Unless vindicated after a hearing held at the direction of this Court, Petitioner will forever bear the stigma of having been sanctioned for unethical conduct.

[6] Indeed, the statements on which the courts below relied as evidence of bad faith were at best one-sided, equivocal, and subject to more than one interpretation. One of the physicians testified at deposition — when led by Respondents' attorney — that Petitioner had made the supposedly improper suggestion "if [he] remember[ed] right," while the other's testimony about the conversation he allegedly had with Petitioner came before the court solely in an affidavit.

2143 (Kennedy, J., dissenting), and to protect the integrity of its proceedings, 111 S. Ct. at 2140 (Scalia, J., dissenting). There is no indication here, however, that Petitioner challenged the district court's authority by resisting its orders or that he otherwise presented a threat to its ability to control the course of the litigation.

An attorney's disregard for the court's power or his flouting of its established procedures is one thing, while his independent interpretation of a rule that has yet to be authoritatively construed is quite another. The former may appropriately be sanctioned under the inherent power, but the latter certainly should not be. *Cf. Mallard v. District Court*, 490 U.S. 296 (1989) (attorney's interpretation differing from that of lower courts upheld). Thus, had Petitioner willfully disobeyed an order directing him to refrain from contacting treating physicians outside of formal discovery, this would be a very different case.[7] As it stands, though, this is simply a case in which an attorney and a trial judge disagreed about the construction of a legal rule. Consequently, the trial judge erred in holding that Petitioner's actions were sanctionable, and the Eighth Circuit also erred in holding that they could only be interpreted as evidence of his bad faith.

By granting the writ and holding that Petitioner should not have been sanctioned for acting in good faith, this Court can correct the Eighth Circuit's erroneous understanding of the reach of the inherent powers and bring it into line with that of the Second, Sixth, and Ninth Circuits. This case therefore presents the Court with an opportunity to address this split among circuits by reassuring trial lawyers that they need not fear the imposition of sanctions when they take positions that cannot be supported simply by reference to settled law.

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[7] Such an order, however, might itself be improper. *See King v. Ahrens*, 798 F. Supp. at 1378.

II. Whether an attorney sanctioned for conduct occurring outside the presence of the trial judge is, absent exigent circumstances, entitled to notice and a hearing before being required to pay a fine.

Attorneys, who are peculiarly vulnerable to the effects of judicial intemperance, ought to be assured the full range of protection afforded by procedural due process. *Cf. Hirschkop v. Snead,* 594 F.2d 356, 366 (4th Cir. 1974) ("Lawyers are not second class citizens.") The district court below nonetheless deprived Petitioner of his property without either notice or a pre-deprivation hearing. Indeed, Petitioner first learned that the court intended to sanction him when it issued the order in which the fines were imposed. He was given no prior opportunity either to respond to the accusations in the order or to explain his actions, even though the Constitution required that opportunity. *See, e.g., Fuentes v. Shevin,* 407 U.S. 67, 90 (1972) (pre-deprivation hearing required save in "extraordinary" circumstances); *Armstrong v. Manzo,* 380 U.S. 545, 551 (1965) (post-deprivation hearing insufficient, as it requires petitioner to overcome force and effect of adverse decree).

That it may be inconvenient to safeguard an attorney's rights in the heat of a hard-fought case cannot excuse the failure to ensure such protection. Precisely because complying with the demands of due process is so often inconvenient, *In re Oliver,* 333 U.S. 257, 280-81 (1948) (Rutledge, J., concurring), courts must not focus solely on expedience. *Fuentes,* 407 U.S. at 90, n.22. They must concentrate instead on preserving the procedural regularity that has played so large a role in the development of our liberty. *Burdeau v. McDowell,* 256 U.S. 465, 477 (1921) (Brandeis, J., concurring). It is, after all, only in the regularity of an established routine that an evenhanded administration of justice can be attained.

The trial court below, however, dispensed with the established routine, dealing summarily — and at Petitioner's expense — with what it saw as a pattern of disregard for the rules

by defense lawyers in similar cases. This rush to censure left Petitioner to suffer the consequences of the judge's annoyance with other lawyers, and that irritation apparently left the court unable to separate Petitioner's good faith attempt to represent his client's interests in this case from the unspecified sins committed by his colleagues in others. Due process emphasizes fair procedures for precisely that reason: they insulate the rest of us from the occasional acrimony of those who act for the state.

Thus, it has long been established that punishment may not be meted out "except upon notice and due hearing, unless overriding necessity precludes such indispensable safeguards for assuring fairness and affording the feeling that fairness has been done." *Sacher v. United States,* 343 U.S. 1, 29-30 (1952) (Frankfurter, J., dissenting) (contempt context). Due process, the constitutional means of effecting the necessary fairness, requires that those deprived of property by governmental action ordinarily receive *"some* kind of notice" and *"some* kind of hearing" before that deprivation takes effect, *Goss v. Lopez,* 419 U.S. 565, 577 (1975) (emphasis in original), because "summary punishment always, and rightfully, is regarded with disfavor and, if imposed in passion or pettiness, brings discredit to a court as certainly as the conduct it penalizes." *Sacher,* 343 U.S. at 8.[8]

Apparently believing he was exercising a power unrelated to contempt (though contempt is merely the best known of the inherent powers, *Roadway Express v. Piper,* 447 U.S. 752, 764

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[8] Since the punishment at issue here was imposed in haste — and perhaps in anger — it is thus particularly suspect. Even if Petitioner's conduct were sanctionable, there was no need for immediate action. This misconduct, if misconduct it was, should have been dealt with as the law deals with other illegal acts: by giving the accused the benefit of advance notice and an impartial hearing. *Toledo Newspaper Co. v. United States,* 247 U.S. 402, 425-26 (1918) (Holmes, J., dissenting), for "[t]he sanctioning process must comport with due process requirements." Fed. R. Civ. P. 26(g), Advisory Committee Note (1983). *Cf. Amendments to the Federal Rules of Civil Procedure and Forms,* 61 USLW 4365, 4369 (1993) (proposed Rule 11(c) — sanctions to be imposed only "after notice and a reasonable opportunity to respond").

(1980)), the trial judge accorded Petitioner neither the notice nor the hearing that would have been mandatory had he held Petitioner in contempt. This cannot have satisfied the Constitution. A court simply should not be able to use its other inherent powers to punish a lawyer without regard to fair procedure if it could not hold the same lawyer in contempt — and then impose the same substantive punishment — without affording him the protections required by due process. *See* Fed. R. Crim. P. 42(a) (contempt occurring outside of court punishable only after hearing); *see also Sacher,* 343 U.S. at 9 (hearing required to enable court to learn all relevant facts).[9]

The well-known constraints on contempt indicate that a court's unfettered use of its other inherent powers is also to be discouraged. Here, however, the Eighth Circuit approved the trial court's exercise of those powers without the checks imposed by due process. Thus, although the result reached by the courts below may have been correct, the means were unconstitutional.[10] Consequently, the decisions below cannot stand, for as this Court long ago recognized,

> [t]o one who protests against the taking of his property without due process of law, it is no answer to say that in

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[9] The conduct for which Petitioner was sanctioned did not occur in the presence of the district judge. Nonetheless, he accepted Respondents' evidence that Petitioner made the allegedly improper statements, and that they had the meaning ascribed to them by Respondents, all without giving Petitioner the opportunity to tell his side of the story.

[10] Petitioner does not, of course, concede that his actions were in any way improper. If they were so, however, it was not for the district judge to make that determination without first notifying Petitioner that he might be sanctioned, and then giving him an opportunity to respond. The court was required to comply with due process even in making the threshold determination of whether Petitioner acted in good faith. *Chambers v. NASCO,* 111 S. Ct. 2123 (1991). Its failure to accord him these basic protections undermines its conclusion that Petitioner's conduct was sanctionable. The district judge simply cannot have been aware of the evidence Petitioner would have presented had he known he was subject to sanctions; the judge considered only the evidence of which he was already aware.

> his particular case due process of law would have led to the same result because he had no adequate defense upon the merits . . . . Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires.

Coe v. Armour Fertilizer Works, 237 U.S. 413, 424 (1915) (citation omitted).

Since "there is always a possibility that a judge may be honestly mistaken," *Sacher,* 343 U.S. at 22, or may "exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir," *id.* at 12, the procedural safeguards demanded by due process are always of pivotal importance. They are intended to protect attorneys whenever the trial judge's ability to make a fair decision may be compromised. Left to their own devices, courts in such cases may simply find it impossible to distinguish the attorney's good faith "desire to win" and "strenuous effort," *id.,* from sanctionable conduct. The Constitution, of course, frowns on judicial decisions made in these circumstances, for "a sound discretion hardly comprehends a pointless exaction of retribution." *Jackson v. Washington Monthly,* 569 F.2d 119, 123 (D.C. Cir. 1977). Punishment imposed in pique brings disrepute upon the courts, and "[p]ublic respect for the judiciary is best enhanced by discouraging an assertion of power which is not restricted by the usual demands of due process." *Sacher,* 343 U.S. at 41-42 (Frankfurter, J., dissenting).

The grant of certiorari is therefore warranted so this Court can further define the boundaries of due process. If fair procedures are required no matter who is being punished or what power is invoked, the Eighth Circuit wrongly endorsed the trial court's semantic dodge in this case; absent guidance, other courts may conclude that they, too, can escape the reach of due process simply by invoking something other than the contempt power when they sanction.

For the foregoing reasons, Calvin J. Hall respectfully requests that his petition for certiorari be granted.

Respectfully submitted,

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APPENDIX

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 92-1428

WILLIAM HARLAN, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF DANIELLE HARLAN, A MINOR; GENICE HARLAN, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF DANIELLE HARLAN, A MINOR,

Plaintiffs-Appellees,

vs.

JAMES S. LEWIS, M.D.,

Defendant-Appellant,

C.E. RANSOM, JR., M.D.,

Movant.

No. 92-1489

WILLIAM HARLAN, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF DANIELLE HARLAN, A MINOR; GENICE HARLAN, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF DANIELLE HARLAN, A MINOR,

Plaintiffs-Appellants,

vs.

JAMES S. LEWIS, M.D.,

Defendant-Appellee,

Submitted: September 16, 1992
Filed: January 12, 1993

Before JOHN R. GIBSON, Circuit Judge,
FLOYD R. GIBSON, Senior Circuit Judge, and
BEAM, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

James S. Lewis, M.D., and his lawyer, Calvin J. Hall, appeal from an order of the district court imposing sanctions on Hall for improper and unethical conduct in ex parte conversations with

two treating physician witnesses. The district court[1] sanctioned Hall $2,500 for each of the two conversations. On appeal, Hall argues that the district court erred in imposing sanctions without a finding of bad faith, in attempting to enforce the Model Rules of Professional Conduct outside of state disciplinary proceedings, and in depriving him of property without due process of law. Lewis argues that the district court erred in interpreting Arkansas Rule of Evidence 503 to prohibit witness interviews between defense counsel and treating physicians, and in using this interpretation to justify the sanctions against Hall. We affirm the order of the district court.

This controversy arises from a medical malpractice case brought against Dr. Lewis by the family of Danielle Harlan. Dr. Lewis was the pediatrician who treated Danielle Harlan during the first few months of her life. The Harlans sued Lewis for allegedly failing to check the results of a mandatory blood test for hypothyroidism. The Harlans allege that the delay in detecting and treating Danielle's hypothyroidism caused her significant injury. Danielle was later treated by several other physicians, none of whom are defendants here or are accused by the Harlans of being responsible for any harm to Danielle.

In the discovery process, the Harlans learned that Lewis' defense counsel, Hall, had talked to two of Danielle's treating physicians, Dr. Edward L. McAdams and Dr. James E. Golleher. The Harlans claimed that these conversations were unauthorized ex parte communications in violation of Federal Rule of Evidence 501 and Arkansas Rule of Evidence 503(d). The Harlans filed a motion requesting sanctions, recovery of costs, and prohibition of further ex parte contact between Hall and the treating physicians.

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[1] The Honorable Henry Woods, United States District Judge for the Eastern District of Arkansas.

The district court issued a memorandum opinion and order granting the Harlans' motion on January 29, 1992. The order began:

> The Court is troubled by the lack of civility among attorneys which has become all too common. The erosion of cooperation and courtesy within the legal community accounts, in large part, for the negative image attorneys suffer in the community at large.

The district court then analyzed two specific instances of misconduct by Hall.

The first instance arose from a conversation between Hall and Dr. McAdams. The Harlans submitted an affidavit containing the following statement by Dr. McAdams, which the district court quoted in its order:

> C.J. Hall [Dr. Lewis' attorney] came up and met with me in Searcy, Arkansas. He told me that as a treating physician, I may be called as a witness at the trial of this matter or *could also be sued by the Harlans.*
>
> *Mr. Hall also told me that if I did not testify for the Harlans, that the suit would probably not be successful.*

The district court held that by suggesting to Dr. McAdams that he not testify, Hall had violated the Model Rules of Professional Conduct, which prevent a lawyer from obstructing another party's access to evidence or from counseling a third party to conceal information having possible evidentiary value. *See* Model Rules of Professional Conduct Rule 3.4(a) (1983). The court went on to state that even if Arkansas law permitted such ex parte interviews, this conduct would be impermissible and unethical. The district court then sanctioned Hall $2,500 for this conduct.

The court next turned to a conversation between Hall and Dr. James Golleher, who supervised the laboratory in which

Danielle's blood was tested. The district court quoted the following passage from Golleher's deposition:

> Q: (by plaintiffs' attorney): And during that conversation [with Mr. Hall], you told Mr. Hall that I had requested to speak to you informally and you had no objection to that. You told him that, didn't you?
>
> A: Yes.
>
> Q: *And Mr. Hall at that time indicated that he did have an objection to you [sic] speaking to me informally, didn't he?*
>
> A: If I remember right.

The district court then referred to Model Rule 3.4(f), prohibiting a lawyer from requesting that "a person other than a client...refrain from voluntarily giving relevant information to another party." Model Rules of Professional Conduct Rule 3.4(f) (1983). The district court concluded that Dr. Golleher was not Mr. Hall's client, and that Hall's suggestion that Dr. Golleher not speak to Harlan's counsel was unethical. The court sanctioned Hall $2,500 for this conduct.

The district court made clear that the sanctions were intended as a "shot across the bow," and that it considered the monetary sanctions "modest." It noted that Hall had recently designated the treating physicians as "defense experts." The district court seriously considered barring the testimony of these treating physician/defense experts in light of Hall's attempts to influence their testimony. The court, however, rejected this harsh step because it would have "effectively eviscerate[d] Dr. Lewis's ability to present a defense."

The district court ordered other remedial measures. The court prohibited defense counsel from meeting with treating physician experts outside the presence of plaintiffs' counsel,

unless the plaintiffs so authorized. Plaintiffs' counsel was specifically permitted to cross-examine these doctors about Hall's attempts to improperly influence their opinions. Finally, if the physicians were to be used as witnesses, defense counsel would be required to turn over to plaintiffs' counsel all notes, record transcripts, and recordings of the ex parte interviews which occurred after the effective date of the 1991 amendments to Arkansas Rule of Evidence 503.

In deciding to impose sanctions and in creating remedial measures, the court discussed in some detail the physician-patient privilege under Arkansas law. In federal courts, state law governs questions involving privilege. *See* Fed. R. Evid. 501. Rule 503 of the Arkansas Rules of Evidence[2] and Rule 35 of the Arkansas Rules of Civil Procedure[3] have similar provisions stating that a party shall not be required to authorize any communication with his physician or psychotherapist other than the furnishing of medical records or communication in the context of formal discovery procedures.

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[2] Rule 503(d)(3) provides as follows:

> . . . There is no privilege under this rule as to medical records or communications relevant to an issue of the physical, mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense...; provided, however, a patient shall not be required, by order of court or otherwise, to authorize any communication with any physician or psychotherapist other than (A) the furnishing of medical records, and (B) communications in the context of formal discovery procedures . . . .

[3] Rule 35(c) provides as follows:

> **Medical Records.** Where a party relies upon his physical, mental or emotional condition as an element of his claim or defense, he shall, upon the request of any other party, execute an authorization to allow such other party to obtain copies of his medical records; provided, however, a party shall not be required, by order of court or otherwise, to authorize any communication with his physician or psychotherapist other than (1) the furnishing of medical records, and (2) communications in the context of formal discovery procedures . . . .

The district court continued, citing the reporter's note to the Rule:

(footnote continues)

The district court concluded that even though the privilege was partially waived through the filing of a lawsuit, the Harlans retained some control over the manner in which the information concerning their medical records and treatment might be released.

The district court's interpretation of Arkansas Rule of Evidence 503 is closely related both to its imposition of sanctions on Hall and to the other restraints placed on defense counsel in its order. On appeal, Hall and Lewis argue against the district court's reading of Rule 503. Hall also argues that the district judge erred in imposing sanctions.

I.

Hall first argues that the district court erred in imposing sanctions without making an explicit finding of bad faith. Hall further contends that there is no factual basis for either an explicit or implied finding of bad faith. We review all aspects of the imposition of sanctions under an abuse of discretion standard. *See Chambers v. NASCO, Inc.*, ___ U.S. ___, ___, 111 S. Ct. 2123, 2138, 115 L.Ed. 2d 27 (1991) (citing *Link* v. *Wabash R.R. Co.*, 370 U.S. 626, 633, 82 S.Ct. 1386, 1390, 8 L.Ed. 2d 734 (1962), and *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 2460-61, 110 L.Ed. 2d 359 (1990)).

The district court sanctioned Hall for two separate actions: Hall's conversation with Dr. McAdams, and Hall's conversation with Dr. Golleher. The district court found that these actions violated two rules: Model Rule 3.4(f) (prohibiting lawyers from asking non-clients to refrain from giving relevant information to other parties), and Arkansas Rule of Evidence 503 (interpreted

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(footnote continued)

> [Subdivision (c)] makes plain that a *party may not be required to allow* an adversary to communicate with the party's physician or psychotherapist outside the formal discovery process. *This safeguard is deemed necessary to protect the confidential relationship between a party and his physician* or psychotherapist.

by the district court as prohibiting all ex parte contact with plaintiff's physicians). The district court also stated that even if its interpretation of Rule 503 was in error and ex parte contact were permissible, Hall's conduct would still be impermissible and unethical. We will discuss the district judge's interpretation of Rule 503 later, but regardless of that interpretation's validity, Model Rule 3.4(f) independently supports the sanctions.

The district court reviewed the record before it and focused on excerpts from Dr. McAdams' affidavit and Dr. Golleher's deposition testimony quoted above. Though Hall quibbles about the subjective understanding of Drs. McAdams and Golleher, he does not deny that these conversations occurred. The district court found that during each conversation Hall attempted to dissuade the doctor from giving testimony or otherwise cooperating with the Harlans. While there may be reasonable alternative interpretations of the conversations, the district court did not abuse its discretion in concluding that Hall had attempted to convince witnesses to refrain from "voluntarily giving relevant information" to the Harlans.

The district court proceeded, under its inherent power, to sanction Hall for both violations of the Model Rule. Both parties now appear to agree that the district court was required to find bad faith prior to imposing sanctions. Hall argues that the finding must be explicit, while the Harlans argue that the finding need only be implicit. We first consider whether the district court must make a finding of bad faith before imposing sanctions pursuant to its inherent power.

The existence in the federal courts of an inherent power "necessary to the exercise of all others" is firmly established. *See United States v. Hudson,* 11 U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812). While this inherent power "ought to be exercised with great caution," it includes the power to discipline attorneys appearing before the court. *See Ex Parte Burr,* 22 U.S. (9 Wheat.) 529, 531, 6 L.Ed. 152 (1824). Over the years, the Supreme Court has found inherent power to include the ability to dismiss actions, assess attorneys' fees, and to impose monetary or other

sanctions appropriate "for conduct which abuses the judicial process." *Chambers*, ___ U.S. at ___, 111 S.Ct. at 2133. The imposition of monetary sanctions against Hall in this case clearly falls within the district court's inherent power.

Hall relies on *Chambers* and *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S. Ct. 2455, 65 L.Ed. 2d 488 (1979), to support his contention that an explicit finding of bad faith is required. Both *Roadway* and *Chambers*, however, discuss the narrow requirement that a district court assessing attorneys' fees against a party or its counsel find that the party had "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y.*, 421 U.S. 240, 258-59, 95 S. Ct. 1612, 1622. 44 L.Ed. 2d 141 (1975).

Although *Roadway* ends with a statement that a finding of bad faith "would have to precede any sanction under the court's inherent powers," the entire opinion discusses only the assessing of attorneys' fees. *Roadway*, 447 U.S. at 767, 100 S.Ct. at 2465. We do not believe *Roadway* extends the "bad faith" requirement to every possible disciplinary exercise of the court's inherent power, especially because such an extension would apply the requirement to even the most routine exercises of the inherent power. *See, e.g., Anderson v. Dunn*, 19 U.S. (6 Wheat) 529, 5 L. Ed. 242 (1821) (discussing the power to "impose silence, respect, and decorum"). We find no statement in Roadway, Chambers, or any other decision cited by the parties,[4] that the Supreme Court intended this "bad faith" requirement to limit the application of monetary sanctions under the inherent power.

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[4] Hall cites *Zambrano v. City of Tustin*, 885 F.2d 1473 (9th Cir. 1989). While the *Zambrano* decision contains some language supporting a general extension of the bad faith requirement, the court is specifically reviewing a district court's imposition of sanctions in the form of attorneys' fees, jury fees, and court expenses. *Id.* at 1475. The *Zambrano* case is also distinguishable by its extraordinary facts: The district court, in response to rather minor offenses (counsel's failing to stand while making objections and failing to file a formal application for admission to the district's bar), apparently threatened to have offending counsel shackled in leg irons and removed from the courtroom. *Id.*

Moreover, even if we assume that a finding of bad faith is required, we conclude that the district court's order implies a finding of bad faith.

The district court first stated that the undisputed facts illustrated Hall's misconduct. In reference to Hall's conversation with Dr. McAdams, the district court concluded that the conduct violated both the Model Rules and the Arkansas Rules of Evidence, and that the conduct was "impermissible and unethical" even if it did not violate these rules. The district court came to a similar conclusion with regard to Hall's conduct in his conversation with Dr. Golleher. Although the district judge did not use the actual words "bad faith," his order contained explicit statements of far greater severity.

Reading the order as a whole, it is evident that the district judge saw in Hall's conduct an intentional effort to obstruct the proper flow of relevant information in the discovery process. Although the district judge did not use the words "oppressive, vexatious, or bad faith" to describe Hall's action, and doing so would have more easily disposed of Hall's present argument, the specific findings of impermissible and unethical conduct are sufficient to supply these meanings. Little is to be gained from requiring semantic improvement when the meaning of the district judge is clear. *See Baker Ind., Inc.* v. *Cerberus, Ltd.*, 764 F.2d 204, 209 (3d Cir. 1985).

II.

Hall next argues that the district court abused its discretion by imposing sanctions instead of referring Hall's conduct to state disciplinary authorities. Hall asserts that "[t]he business of the court is to dispose of litigation and not to act as a general overseer of the ethics of those who practice [before it] *unless the questioned behavior taints the trial of the cause before it*". Appellant's Brief at 17 (quoting *United States* v. *Dennis*, 843 F.2d 652, 657 (2d Cir. 1988)). Hall also argues that "*[w]here there is no*

threat to the integrity of further proceedings, possible ethical violations which "surfac[e] during the litigation are generally better addressed by the comprehensive machinery of the state and federal bar." (quoting *Armstrong* v. *McAlpin,* 625 F.2d 433, 444 (2d Cir. 1980) (en banc), *vacated on other grounds and remanded,* 499 U.S. 1106, 101 S.Ct. 911, 66 L.Ed. 2d 835 (1981)).

We entertain no doubt that the district judge was authorized to preserve the integrity of the proceedings before him by imposing sanctions. The questioned behavior tainted the trial of the cause and threatened the integrity of further proceedings. The district judge saw Hall's misconduct as having a significant negative effect on both the discovery process and the eventual trial. A district judge must have the power to deal with conduct of attorneys in litigation without delegating this responsibility to state disciplinary mechanisms. State disciplinary authorities may act in such cases if they choose, but this does not limit the power or responsibility of the district court. In addition, the state disciplinary body could not have repaired the damage Hall caused by attempting to restrict the flow of relevant information and discovery and by planting implied threats in the minds of potential witnesses. Under these circumstances, the district court was correct in resolving both the disciplinary and remedial questions in a single action.

Harlan has cross-appealed arguing for a more potent sanction, such as striking the defendants' answer or precluding the witnesses improperly contacted from testifying. The district court did not abuse its discretion in its careful assessment of the nature of the sanction to be imposed.

III.

Finally, Hall argues that he was sanctioned by the district court without due process of law. The sole issue is whether Hall had notice that the court was considering sanctions against him. Hall contends that the Harlans' motion seeking sanctions was not sufficiently specific to put him on notice. He also argues that

Dr. McAdams' affidavit, in which the conversation between Hall and McAdams is described, was not before the court until after Hall responded to the Harlans' motion. After reviewing the record, we conclude that the district court provided due process in imposing sanctions.

A brief review of the procedural history of the sanctions is in order here. On November 13, 1991, the Harlans filed a pleading captioned: "MOTION TO PROHIBIT EX PARTE COMMUNICATIONS and COMMUNICATIONS WITHOUT AUTHORIZATION, TO RECOVER UNNECESSARY COSTS INCURRED BY PLAINTIFF'S COUNSEL DUE TO THE ACTIONS OF DEFENSE COUNSEL, AND SCHEDULING ORDER." In this motion, the Harlans requested, among other things, that the court strike the defendant's answer in this case and assess attorneys' fees and other expenses against the defendants. The Harlans also requested "any other relief deemed necessary and equitable by this Honorable Court." The Harlans also filed a brief and a substantial set of exhibits documenting Hall's ex parte communications with various treating physicians (including Drs. Golleher and McAdams). The motion clearly indicates that the Harlans were seeking sanctions for Hall's conversations with the treating physicians.

On December 6, 1991, Hall filed a response to the motion, which acknowledged that "[p]laintiffs are pursuing sanctions in the case at bar on the basis that conversations have taken place."

On December 17, 1991, the Harlans replied and attached Dr. McAdams' affidavit, which the district court cited in its order. The conversation between McAdams and Hall was documented in an exhibit submitted with the Harlans' original motion. The district court issued its memorandum opinion and order on January 29, 1992.

Hall's argument turns on whether the December 6 motion provided Hall with adequate notice that the court would be considering sanctions against him. Striking an answer is the most severe sanction available to a court by virtue of its inherent

power, as it would lead to entry of an adverse judgment. Likewise, an assessment of attorneys' fees can impose a severe penalty. By comparison, the monetary sanctions levelled against Hall are relatively mild. The December 6 motion provided Hall with clear notice that the court would be considering the imposition of the most severe sanctions against the defendants on the basis of Hall's personal conduct. If, as he now suggests, Hall possessed additional evidence which would have placed the Golleher and McAdams conversations in context, he had every opportunity, and perhaps an ethical duty, to present them in his client's defense.

Even if we accept Hall's argument that the alleged conversations were not fully before the court until the McAdams affidavit was filed in connection with the Harlans' December 17 reply, forty calendar days elapsed before the court entered its order. During that time Hall could have requested a hearing, submitted additional evidence, or alerted the court to any relevant information regarding the disputed conversations. He did none of these things.

Hall relies on our decision in *Jensen v. Federal Land Bank*, 882 F.2d 340 (8th Cir. 1989). The facts of *Jensen* are distinguishable. In *Jensen*, a bankruptcy judge sanctioned an attorney immediately after observing that attorney's noncompliance with a court order (requiring the attorney to present an amended version of a plan). *Id.* at 340-41. There was no real notice of any kind in *Jensen*, and the attorney had no opportunity at all to argue against the imposition of sanctions. *Id.* at 341-42. Conversely, Hall had notice in the December 6 pleading and at least forty calendar days to respond before the district court acted. The present case resembles *Lepucki v. Van Wormer*, 765 F.2d 86 (7th Cir.), *cert. denied*, 474 U.S. 827, 106 S.Ct. 86, 88 L.Ed. 2d 71 (1985), in which the Seventh Circuit held that an attorney who did not have explicit notice that the court was considering imposing costs and fees against him nevertheless had sufficient notice because he knew that the court was considering generally the imposition of penalties. *Id.* at 88.

Finally, beyond the issue of adequate notice, the district court fully complied with due process. A court must exercise its inherent powers with restraint and discretion, and a primary aspect of that discretion is the ability to fashion an appropriate sanction. *See Chambers*, ___ U.S. at ___, 111 S. Ct. at 2132-33. Here, the district judge did not rush into an ill-considered imposition of sanctions. Despite the Harlans' request, the district judge rejected the most severe sanction available under the court's inherent power. He also considered less severe sanctions (i.e., requiring Hall to write a letter of apology). Finally, he considered the effect that various sanctions might have on the course of the litigation and the ability of the parties, especially the defendants, to present their case. In the end, the district judge decided upon a narrowly tailored solution which sanctioned the individual responsible, attempted to remedy the damage caused by the misconduct, and preserved as far as possible the rights of all parties.

We conclude that the district court did not offend due process in its imposition of sanctions against Hall.

IV.

Lewis argues on appeal that the district court erred in interpreting Ark. R. of Evid. 503(d)(3) as prohibiting all informal ex parte contact with treating physicians absent an authorization by the patient. The district court made this determination as one component of its order authorizing sanctions against Hall, and restricting any further ex parte contact between defense attorneys and treating physicians in this case. Lewis argues that Rule 503(d)(3) merely prohibits forcing a patient to authorize ex parte contact with his or her treating physicians. The Harlans argue in favor of a broader protection; namely, that ex parte, informal contact between defense counsel and treating physicians in a malpractice action is impermissible without authorization from the plaintiff, and that Rule 503(d)(3) simply makes it

explicit that a plaintiff cannot be forced to authorize such contact.[5] The district judge substantially adopted the Harlans' view. More recently, Judge Waters of the Western District of Arkansas adopted the interpretation proposed by Lewis. *See King v. Ahrens*, 798 F. Supp. 1371 (W.D. Ark. 1992), *appeal filed*, No. 92-2997 (8th Cir. Sept. 8, 1992).

The language giving rise to these rival interpretations was added to Rule 503 by amendment on May 13, 1991. The Arkansas Supreme Court has acknowledged the existence of this question, but it has never directly ruled on the proper interpretation of the 1991 amendment. *See Duncan v. Cole*, 302 Ark. 60, 786 S.W.2d 587 (1990). The duty of the district court in the absence of decisions from Arkansas courts interpreting the 1991 amendment was to determine the state supreme court's probable interpretation. *See Anderson v. Employers Ins. of Wausau*, 826 F.2d 777, 779 (8th Cir. 1987).

In the case before us, the district court first reviewed the general history of the physician-patient privilege, and then analyzed the Arkansas statutory physician-patient privilege. In interpreting the 1991 amendments to Rule 503, the district court examined the corresponding 1991 amendments to Rule 35 of the Arkansas Rules of Civil Procedure. Finally, the district court reviewed the relevant public policy considerations and decisions from other jurisdictions.

We are bound to review de novo the district court's state law determination, giving its decision no deference. *See Salve Regina College v. Russell*, ___ U.S. ___, 111 S. Ct. 1217, 1221, 113 L.Ed. 2d 190 (1991). We believe that the district court's interpretation of Rule 503(d)(3) is consistent with other Arkansas Rules of Evidence and existing state law. First, the Arkansas statutory physician-patient privilege resides with the patient, and not with the physician. *See* Rule 503(b). Second, only the holder of the

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[5] Of course, a plaintiff in a malpractice action is required to authorize the release of relevant medical records and formal discovery by defense counsel. *See* Ark. R. of Evid. 503(d)(3); Ark. R. Civ. P. 35.

privilege has the capacity to waive that privilege by voluntary disclosure. *See* Ark. R. of Evid. 510. Finally, a claim of privilege is not defeated by "a disclosure which was . . . made without *opportunity to claim the privilege*." Ark. R. Evid. 511 (emphasis added).

The 1991 amendments to Rule 503 and Rule 35 of the Arkansas Rules of Civil Procedure define privilege,[6] limit its application, require authorization for disclosure where the condition is an element in a claim or defense, and, as the district court observed, regulate the manner in which information concerning medical treatment is released.

The district court opinion, the briefs of the parties, and the opinion in *King v. Ahrens* all raise questions relating to the scope and nature of physician-patient privilege. We need not explore these issues in detail, because we believe that the issue before us concerns not the scope of the privilege but the manner of disclosure required under the Arkansas rules.

Both Rule 503(d)(3) and Arkansas Rule of Civil Procedure 35 provide that a party may not be required by order of court or otherwise to authorize "any communication" with his physician other than the furnishing of medical records and communications in the context of formal discovery procedures. "Any communication" is an inclusive term. Where the rule specifically prescribes the manner of disclosure to which a patient must consent, we cannot read the plain language of the rules to permit disclosure in ex parte interviews. The strict requirements of consent are antithetical to the authorization of non-consensual ex parte interviews. Furthermore, when the Arkansas Supreme

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[6] The scope of the physician-patient privilege in Arkansas law has evolved over the years. The original privilege, created by Arkansas Statute § 28-607 (1947), covered all information a physician had about a patient. Rule 503 replaced this statute and limited the privilege to confidential communications between the patient and doctor. *See Baker v. State of Arkansas*, 276 Ark. 193, 637 S.W.2d 522, 524-25 (1982). The 1991 amendment defined privilege to cover medical records or confidential communications made for the purpose of diagnosis or treatment. *See* Rule 503(b).

Court adopted the 1991 version of these rules, it also adopted an amendment to the Reporter's Note accompanying Arkansas Rule of Civil Procedure 35 which states:

> New subdivision (c) of this rule sets out the circumstances under which a party must authorize release of his medical records to another party. It also makes plain that a party may not be required to allow an adversary to communicate with the party's physician or psychotherapist outside the formal discovery process. This safeguard is deemed necessary to protect the confidential relationship between a party and his physician or psychotherapist.

Underscoring the limitation on communication outside the discovery process and the confidential relationship between patient and physician is fully consistent with the language of the Arkansas rules. The district court did not err in determining that the rules prohibited non-consensual ex parte communications with the treating physicians. The district court's ruling is not only appropriate, but indeed is required if careful attention is given to the notion of consent embodied in the rules.

Another consideration enters our analysis: Rule 503(d)(3) removes the privilege only from communications or records concerning a condition that is an element of a claim or defense; information not relating to such a condition is still privileged. If the rules did not strictly prescribe the manner in which treating physicians could disclose information, it would be left to the treating physician to determine what information was subject to disclosure and what information remained privileged. Requiring that contact with treating physicians occur only within the context of formal discovery relieves the treating physician of this responsibility, protects any still privileged information that the physician might possess, and provides for the orderly disclosure of information relating to the condition that is an element of the claim or defense. We reject the arguments of Hall and Lewis that ex parte interviews are authorized generally by discovery rules, or that the filing of the suit operates as an absolute waiver of the

privilege. The carefully crafted Arkansas rules are simply to the contrary.

The district court relied on the discussion in *Crist v. Moffett*, 326 N.C. 326, 389 S.E.2d 41 (1990). *Crist* differentiated issues of privilege from issues concerning the manner in which information may be obtained from a plaintiff's treating physician. *Id.* 389 S.E.2d at 45-46. *Crist* pointed to the confidential nature of the physician patient relationship which it held to be separate and distinct from the statutory privilege. Thus, even when the privilege was waived, the confidential nature of the physician-patient relationship justified control over the release of information. *Id.* at 46-47. *Crist* concluded that formal discovery provided the most effective means of enabling opposing parties to reach relevant information while simultaneously protecting the patient's privacy. *Id.* The presence of counsel and the possibility of judicial intervention helped to insure these results. Formal discovery also protects the treating physician from liability arising from improper disclosure of information in an ex parte conference. *Id.* The reasoning in *Crist* persuades us, as it did the district court.

We realize that our decision on the state law question is our prediction of what the Supreme Court of Arkansas will decide, and it is evident that when that court reaches these issues its decision will be the ultimate authority.

Finally, during oral argument, Lewis' counsel asserted that affirming the district court would allow malpractice plaintiffs to use Rule 503 to interfere in the relationship between defense counsel and a malpractice defendant. We reject this argument. When a doctor is a party to the action, four different considerations apply: (1) the party doctor has a right to be represented by counsel; (2) this right is meaningless without the ability to converse freely with counsel about the representation; (3) when the issue is malpractice, the party physician must be able to consult with counsel about the treatment at issue and this entails disclosure of the details of that treatment; and (4) the law of privilege

applying to medical witnesses should not render the party physician powerless to prepare a defense. Arkansas case law reenforces our belief that Rule 503(d)(3) language is intended to apply only to treating physicians, other than the defendant physician, who may be called to testify in the case. *See, e.g., Duncan v. Cole*, 786 S.W.2d at 587; *Goodwin v. Harrison*, 300 Ark. 474, 780 S.W.2d 518 (1989).

We affirm the order of the district court.

BEAM, Circuit Judge, concurring specially.

I concur in Parts I, II, and III of the court's opinion and in the imposition of sanctions. I also concur in the affirmance of the district court's interpretation of Ark. Rule of Evid. 503 as set forth in Part IV of the opinion, but only insofar as the district court ruling affects the issue raised by Dr. Lewis on appeal.

Our opinion notes that Judge Franklin H. Waters, United States District Judge for the Western District of Arkansas, has now construed Rule 503(d)(3) in accordance with the argument advanced by appellant Hall. Were we writing on a clean slate in this appeal, I would lean toward Judge Waters's analysis. We are not so writing, of course, because of the proceedings already undertaken in the district court and because of Judge Woods's analysis of the privilege.

I believe that Judge Woods's interpretation is tenable, and one that will permit discovery and trial in this litigation to proceed without great injustice. Accordingly, I register my limited concurrence in the affirmance. I hope, however, that the Arkansas Supreme Court will find it appropriate to settle this important issue in the near future.

The court's opinion correctly points out that Judge Woods based his sanction order, in part, on his interpretation (and, presumably, Hall's purported misinterpretation) of Rule 503(d)(3). This was error. While I support the order of sanctions on other grounds, the order should not have been bottomed in any way upon a dispute as to what Rule 503(d)(3) permits or precludes.

As shown by the good faith disagreement between eminent Judges of the Eastern and Western Districts of Arkansas, it is evident that Hall's interpretation is also tenable. In my view, then, it is wrong for a sanction to have been imposed on the basis of the privilege. If a lawyer is subject to sanctions simply because he has disagreed with a judge over the reading of a rule of evidence or procedure, the unwarranted chilling effect upon the adversarial process is obvious.

IN THE

United States District Court

EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-91-244

WILLIAM HARLAN AND
GENICE HARLAN, INDIVIDUALLY
AND AS PARENTS AND NATURAL
GUARDIANS OF DANIELLE HARLAN,
A MINOR

Plaintiff

vs.

JAMES S. LEWIS, M.D.

Defendant

January 29, 1992

MEMORANDUM OPINION AND ORDER

HENRY WOODS, District Judge.

The Court is troubled by the lack of civility among attorneys which has become all too common. The erosion of cooperation and courtesy within the legal community accounts, in large part, for the negative image attorneys suffer in the community at large.

Moreover, constant squabbling increases the cost of litigation for all parties and causes unnecessary delay in the resolution of disputes between citizens. Reduction of the cost of litigation and the elimination of unnecessary delay have recently been the focus of concern in this district and across the nation. At the direction of Congress, task forces across the nation have studied ways and means of increasing efficiency and reducing waste of time and money in the federal courts. In the Eastern District of

Arkansas, an Advisory Committee of local attorneys, court staff and private citizens volunteered countless hours studying the causes of unreasonable litigation costs and delay in this district and recommending solutions. Their findings and conclusions, which appear in a comprehensive report,[1] recommend the continued imposition of sanctions "as needed to control litigation abuses, but only as needed for that purpose."[2]

The case at hand is a garden variety lawsuit, unremarkable except for the enmity between counsel. Plaintiffs' counsel has, in disregard of Local Rule 13(a), included the Court on the mailing list for much, if not all, of the attorney bickering conducted via correspondence. On the other hand, the conduct of the defendant's counsel in this case has gone beyond discourteous and crossed into the zone of impermissible and unethical conduct. For reasons explained more fully below, abuses in this case justify and require sanctions.

I. Background

This case involves allegations of permanent damages to an infant, Danielle Harlan, allegedly due to the failure of the defendant physician, James S. Lewis, to check the results of a mandatory blood screen for a condition known as hypothyroidism. According to the plaintiffs' allegations, hypothyroidism, if detected and treated soon after birth, results in no long-term damage to a child. If left undetected and untreated it can lead to irreversible mental retardation.[3]

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[1] *See Shults, Chair, Report of the Advisory Group for the United States District Court for the Eastern District of Arkansas Under the Civil Justice Reform Act of 1990* ("Advisory Report").

[2] *Id.* Advisory Report Recommendation No. 12

[3] By briefly stating the plaintiff's alleged cause of action, the Court in no way intends to comment on issues in dispute. The Court is aware that the defendant may contend, among other things, that Danielle Harlan's condition is not the result of lack of treatment after birth. The allegations are recited, in summary, for the sole purpose of explaining the issues involved in the current discovery disputes, the Court's rulings and the reasons therefor.

The defendant, Dr. Lewis, was Danielle's pediatrician from birth through the first few months of her life. She was subsequently treated by several other physicians, none of whom are, or have been, defendants in this case. It does not appear from the pleadings now before the Court that either party contends that subsequent treating physicians were in any way to blame for the damages to Danielle Harlan.

The plaintiff has moved to prohibit the defendant's attorneys from contacting Danielle's non-party treating physicians and speaking with them *ex parte* (out of the presence of the plaintiffs' attorney) and "informally" (without the patient's authorization or consent).

II. The Physician-Patient Relationship

At the heart of this dispute lies the physician/patient privilege and a patient's right to prevent or limit the broadcast of confidential communications made to their physicians in the course of the physician-patient relationship.

Most privileges which protect information from disclosure are based on the notion that full, open, honest communication within some relationships — for example between husband and wife, attorney and client, and physician and patient — is so important to the well-being of a civilized society that those communications must be protected from disclosure. The fostering of open and honest communication within those relationships is deemed to outweigh society's interest in obtaining information. Although some privileges, such as the peer review privilege[4] which Dr. Lewis has asserted in this case, are not based on special relationships, they nonetheless seek to foster open, frank,

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[4] A.C.A. § 20-9-503 provides:

"The proceedings and records of a peer review committee . . . shall not be subject to discovery or introduction into evidence in any civil action against a provider of professional health services arising out of the matters which are subject to evaluation and review by the committee . . . "

and honest communications by insuring that the information will not be revealed at a later time.

There were no privileges at common law. They arise, if at all, statutorily. Notwithstanding the fact that the common law never imposed a requirement upon them, physicians long ago recognized the crucial importance of confidentiality in the physician-patient relationship. For hundreds of years the medical profession has adhered to the wisdom of Hippocrates, recognizing an ethical obligation not to divulge information about patients.[5]

The purpose of both the statutory physician-patient privilege and the self-imposed ethical restraints observed by physicians in handling their patients' medical information are evident. However, perhaps a summary is in order.

> The purpose of the physician-patient privilege is to enable the patient to secure complete and appropriate medical treatment by encouraging candid communications between patient and physician, free from fear of the possible embarrassment and invasion of privacy engendered by an unauthorized disclosure of information.

State Ex Rel. Woytus v. Ryan, 776 S.W.2d 389 (Mo. banc 1989). *See also, Petrillo v. Syntex Laboratories, Inc.,* 148 Ill. App. 3d 581, 102 Ill. Dec. 172, 499 N.W.2d 952 (1986).

The ethical obligation of physicians to protect and safeguard the confidences of their patients, absent legal compulsion to disclose, has not been lost on the public. While persons outside the legal profession may not understand all of the legal niceties of the privilege, there is a general public understanding

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[5] Section 5.05 of the Current Opinions of the Judicial Counsel of the American Medical Association states:

> "Information disclosed to a physician during the course of a relationship between a physician and a patient is confidential to the greatest possible degree . . . . The physician should not reveal confidential communications or information without the *express consent* of the patient *unless required to do so by law.*" (Emphasis added.)

that physicians will not disclose patient information unless and until they are legally compelled to do so.

> [T]he public has a wide-spread belief that information given to a physician in confidence will not be disclosed to third parties absent legal compulsion, and we further believe that the public has a right to have this expectation realized.

Duquette v. Superior Court of County of Maricopa, 161 Ariz. 269, 275, 778 P.2d 634, 640 (App. 1989).

III. The Physician-Patient Privilege in Arkansas

Although, generally speaking, state rules of evidence do not apply in federal court, questions involving privilege are governed by state law. Fed. R. Ev. 501.[6] Thus we turn to the law of the State of Arkansas in this diversity medical malpractice case to determine: (1) the scope of the statutory physician-patient privilege, and (2) the manner in which information which is no longer privileged may be discovered.

In Arkansas, the physician-patient privilege, set out in Rule 503 of the Uniform Rules of Evidence, A.C.A. § 16-41-101, grants a patient the privilege of preventing "*any other person* from disclosing confidential communications[7] made for the purpose of diagnosis or treatment of his physical, mental, or emotional condition . . . ." (emphasis added).

Pursuant to Rule 503(d)(3), a patient waives the privilege "as to a communication relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding

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[6] Fed. R. Ev. 501 states in pertinent part: "[I]n civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with the State law."

[7] "Confidential communications" are defined in Rule 503(5) of the Arkansas's Uniform Rules of Evidence:

(footnote continues)

in which he relies upon the condition as an element of his claim or defense . . . ." This limited waiver balances the need for confidentiality with the need for relevant information in a lawsuit.

The defendant contends that by filing a medical malpractice suit the plaintiffs generally, forever, and for all purposes waived any right to control release of confidential information confided to, or discovered by, any treating physician. "Having made public by the filing of this lawsuit that which was once confidential, the plaintiffs cannot be selective in the waiver of the privilege." (Defendant's Response to Motion to Prohibit *Ex Parte* Communications, p. 19).

By recent amendments to its rules of evidence and its rules of civil procedure, Arkansas has explicitly adopted the better view. Rule 35 of the Arkansas Rules of Civil Procedure[8] has been amended to add a new subdivision:

> *(c) Medical Records.* Where a party relies upon his physical, mental or emotional condition as an element of his claim or defense, he shall, upon the request of any other party, execute an authorization to allow such other party to obtain copies of his medical records;

(footnote continued)

> "A communication is 'confidential' if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination, or interview, persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician, psychotherapist, or chiropractor, including members of the patient's family."

[8] The defendant argues that this Court should ignore the Rule 35 change because the Arkansas Rules of Civil Procedure do not apply in federal court. The argument is unpersuasive. As noted above, federal courts look to state law to determine what, if any, privilege applies. If nothing else, the amendments to ARCP 35 and to the Reporter's Note, vitiate the defendant's argument that the Supreme Court of Arkansas did not really mean what it said with the amendment to Rule 503 of the Uniform Rules of Evidence.

> provided, however, a party shall not be required, by order of court or otherwise, to authorize any communications with his physician or psychotherapist other than (1) the furnishing of medical records, and (2) communications in the context of formal discovery procedures . . . .

The Reporter's Note accompanying Rule 35 was also amended to provide:

> [Subdivision (c)] makes plain that a *party may not be required to allow* an adversary to communicate with the party's physician or psychotherapist outside the formal discovery process. *This safeguard is deemed necessary to protect the confidential relationship between a party and his physician* or psychotherapist. (Emphasis added.)

Rule 503 of Arkansas's Uniform Rules of Evidence was amended simultaneously with Rule 35. Rule 503(d)(3) now reads, in pertinent part:

> (3) . . . There is no privilege under this rule as to medical records or communications relevant to an issue of the physical, mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense . . . ; provided, however, a patient shall not be required, by order of the court or otherwise, to authorize any communication with any physician or psychotherapist other than (A) the furnishing of medical records, and (B) communication in the context of formal discovery procedures.

Thus even though the privilege is partially waived through the filing of a lawsuit, Arkansas citizens retain some control over the *manner* in which information concerning their medical records and treatment is released. This places Arkansas among an enlightened "emerging consensus [of states adhering] to the position that defense counsel is limited to the formal methods of

discovery enumerated by the jurisdiction's rules of civil procedure, absent the patient's express consent to counsel's *ex parte* contact with her treating physician." *Crist v. Moffatt,* 326 N.C. 326, 389 S.E.2d 41 (1990).

IV. Public Policy Considerations

Public policy considerations favor the Arkansas view. It strikes an appropriate balance between the parties' ability to obtain all relevant information and the patient's right to have irrelevant medical information remain confidential. There is absolutely no relevant medical information which can be withheld under the Arkansas view. All relevant medical information is fully discoverable. The only hitch is that third parties must utilize formal discovery tools. Under a contrary view, physicians would be legally free to indulge in the idle break-room gossip about all of their patients involved in any litigation where the patient's health is either a claim or defense.

Beyond protecting confidences which are not relevant to any issue in a lawsuit, the Arkansas view protects society's interest in safeguarding the "unique and confidential nature of the physician-patient relationship." *Crist,* 389 S.E.2d at 46. In sum, even though the physician-patient privilege is waived throughout the filing of a lawsuit, "the confidential nature of the physician-patient relationship remains, even though medical information is then subject to discovery." *Id.*

Other compelling public policy concerns are implicated. Informal *ex parte* interviews with attorneys representing interests adverse to their patients are unfair to treating physicians. Physicians unfamiliar with legal proceedings may be unaware of their right to refuse to participate in such interviews.

> A physician may lack an understanding of the legal distinction between an informal method of discovery such as an *ex parte* interview, and formal methods of discovery such as deposition and interrogatories, and

> may therefore feel compelled to participate in the *ex parte* interview.

Duquette, 778 P.2d at 641.

Furthermore, unauthorized *ex parte* interviews force physicians to make legal — not medical — decisions affecting their patients and themselves. By filing a malpractice claim, patients waive the physician-patient privilege *only* as to those communications "relevant to an issue in [a] proceeding . . . . "[9] How can a physician be expected to distinguish medical information which is "relevant to an issue" — and thus no longer privileged — from medical information which is important and interesting, but *irrelevant* to the issues in a lawsuit — information which is still privileged? Unauthorized *ex parte* interviews leave physicians in the undesirable position of making legal decisions without benefit of either (1) disinterested legal advice *or* (2) the presence of the attorney representing his or her patient's interest.

> The physician, largely unschooled in legal matters, cannot be expected to make the sometimes difficult determination of what matters are relevant to the plaintiff's claims. [Citation omitted] The participation of both parties' counsel in formal discovery will help to insure that these questions are resolved to the satisfaction of both parties or that more intractable problems are submitted to the trial court for its impartial determination.

Nelson v. Lewis, 130 N.H. 106, 534 A.2d 720, 723 (1987). Often physicians are not aware of the precarious legal position *ex parte* interviews place them in.

> Breaches of patient confidentiality, whether the result of inadvertence or pressure by the interviewer, may expose the doctor to charges of professional misconduct or tort liability.

Crist v. Moffatt, 389 S.E.2d at 47.

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[9] Rule 503(d)(3), Arkansas Uniform Rules of Evidence.

Ex parte interviews between nonparty treating physicians and lawyers representing interests adverse to the patient open the door for improper or unethical conduct.

> An unauthorized *ex parte* interview could disintegrate into a discussion of the impact of a jury's award upon a physicians' professional reputation, the rising cost of malpractice insurance premiums, the notion that the treating physician might be the next person to be sued, and other topics which might influence the treating physician's views. The potential for impropriety grows even larger when defense counsel represents the treating physician's own insurance carrier and when the doctor, who typically is not represented by his personal counsel at the meeting, is unaware that he may become subject to suit by revealing the plaintiff/patient's confidences which are not pertinent to the pending litigation.

Crist v. Moffatt, 389 S.E.2d at 47, quoting *Manion v. N.P.W. Medical Center, Inc.,* 676 F.Supp. 585, 594-95 (M.D. Pa. 1987).

The record in this case underscores the misunderstanding arising from a situation where one law firm represents the malpractice carrier for virtually all physicians in the state. The record is replete with testimony of conversations between Mr. Hall, or another member of his firm, and nonparty physician witnesses in the case — both treating and nontreating. The potential for improper communication is magnified when the attorneys for the insurance carrier are permitted to engage treating physicians in casual conversation about their patients.

For example, Dr. C.E. Ransom, the physician who delivered Danielle Harlan, testified in his deposition about contacts by defendant's attorney, Mr. Hall:

> Q (by plaintiffs' counsel): have you ever met or discussed this matter with Mr. Hall prior to today?
>
> A: . . . [Mr. Hall] called and told me that he wanted to meet with me relative to a lawsuit that had been filed

> against Dr. Lewis concerning the Harlan baby. And then subsequently he came to the office . . . . The other time that I've talked to him about this, it was after you had come by wanting to talk to me about this case. Not knowing what you wanted to ask me or talk to me about, I — knowing that he [Mr. Hall] was St. Paul's [the malpractice insurance carrier's] lawyer, at least one of them, I called him and — to ask him for advice . . . .

To Mr. Hall's credit, he referred Dr. Ransom to St. Paul without giving advice. Nonetheless, this testimony illustrates one danger identified by the *Manion* court:

> Furthermore, the unauthorized *ex parte* interview of a plaintiff's treating physician by defense counsel creates a situation which may invite questionable conduct. This court will not overlook the current concerns in the medical malpractice insurance industry and the attitudes of physicians and carriers alike.

Manion, 676 F.Supp. at 594.

In this case, Dr. Ransom agreed to talk with Mr. Hall — and in fact initiated one telephone conversation — but refused to talk informally with his own patient's attorney outside formal discovery. The fact is that physicians tend to consider St. Paul's attorneys *their* attorneys, even when they are not parties to the lawsuit. This tendency is aptly demonstrated by the fact that Dr. Ransom, a non-party treating physician telephoned Mr. Hall for his permission, or at least his advice, about talking with *his own patient's attorney.*

The Court does not ascribe evil motives or intent to physicians' assumption that their malpractice carrier's attorney is *their* attorney, but it buttresses the argument against permitting treating physicians to engage in unauthorized informal chitchat about their patients with their malpractice carrier's attorneys. Such conversations create an inherent conflict of loyalties for the physicians.

V. Attorney Misconduct

In *Manion*, the district court emphasized the facts that there were no allegations or evidence of misconduct on the part of the defense attorney. Regrettably, that is not true in this case. We need look no further than the undisputed facts in this case for illustration of exactly the kind of misconduct to which the *Manion* court referred.

The plaintiffs have submitted sworn testimony indicating that one of the defendant's attorneys, Mr. C.J. Hall, made improper and unethical comments and suggestions in *ex parte* interviews. Dr. Edward L. McAdams's affidavit indicates that shortly after the Harlans filed suit, Dr. Lewis's attorney, Mr. Hall, visited Dr. McAdams.

> "C.J. Hall [Dr. Lewis's attorney] came up and met with me in Searcy, Arkansas. He told me that as a treating physician, I may be called as a witness at the trial of this matter or *could also be sued by the Harlans.*
>
> *"Mr. Hall also told me that if I did not testify for the Harlans, that the suit would probably not be successful."*

Affidavit of Edward L. McAdams, M.D., Exhibit D to Plaintiffs' Reply to Response to Motion to Prohibit *Ex Parte* Communications (Emphasis added). By suggesting to Dr. McAdams that he not testify, the defendant's lawyer has violated Model Rules of Professional Conduct which prohibit a lawyer from obstructing another party's access to evidence or from counseling a third party to conceal information having "possible evidentiary value." Model Rule 3.4(a). Even if the Arkansas Rules permitted *ex parte* interviews, this conduct would be impermissible and unethical. Defense counsel's improper conduct illustrates graphically the wisdom of the prohibition against unauthorized *ex parte* communications with a patient's treating physician. C.J. Hall is hereby sanctioned $2500, an amount the Court considers paltry, in light of the conduct.

The defendant has recently designated treating physicians as "defense experts." The defendant will not be permitted to

circumvent the clear intent of the Arkansas rules relating to privilege by this disingenuous designation. The Court has seriously considered barring these treating physician/defense experts from testifying at all in light of defense counsel's blatant refusal to acknowledge, much less comply with, rules 503 and 35 and his improper attempts to influence testimony. *See Karsten v. McCray,* 157 Ill. App. 3d 1, 109 Ill. Dec. 364, 509 N.E.2d 1376 (2d Dist. 1987) *app. den Karsten v. McCray,* 117 Ill. 2d 544, 115 Ill. Dec. 400, 517 N.E.2d 1086 (1987) ("We therefore further hold that barring the testimony of a plaintiff's treating physician is an appropriate sanction to protect the physician-patient privilege from defense interviews outside formal discovery.") However, such a sanction would effectively eviscerate Dr. Lewis's ability to present a defense. Therefore, the defendant will be permitted to elicit expert opinions from treating physicians, but defense counsel may not meet with treating physician "experts" outside the presence of the plaintiffs' attorney, unless the plaintiffs so authorize. Of course, plaintiffs' counsel will be permitted to cross-examine these "experts" about defense counsel's attempts to improperly influence their opinions. Furthermore, if the defendant intends to use treating physicians as expert witnesses, defense counsel must turn over to plaintiffs' counsel all notes, records, transcripts and recordings of *ex parte* interviews with those treating physicians which have occurred since April 1, 1991, the effective date of the amendment to Rule 503.

The defendant makes two arguments that merit comment. First, he advances the argument that the new Arkansas rule prohibiting unauthorized *ex parte* contact was "adopted by the Supreme Court pursuant to a concerted effort by the plaintiffs' bar." (Defendant's Response to Plaintiff's Motion to Prohibit *Ex Parte* Communications, at p.9). Assuming the defendant's assertion to be true, the Court is at a loss to understand what it has to do with the applicability of the rule to defense counsel. The implication that attorneys are bound only by those court rules they like — the rules their "side of the bar" endorsed — is not only novel, it is astonishing.

Second, the defendant argues that Rule 503(d)(3) does not mean what it appears to mean. The defendant argues that Rule 503(d)(3) merely means that patients cannot be forced to authorize defense lawyers to interview treating physicians *ex parte,* but that if the patients assert that right, defense lawyers are free to proceed with such contacts anyway. According to the defendant, in order to prevent unauthorized *ex parte* contacts, the Supreme Court should have stated: "A defense attorney shall not interview or contact *ex parte* any treating physician of the plaintiff." Of course, the obvious reason the Supreme Court did not phrase the amendment to Rule 503 as the defendant suggests is that defense counsel may indeed interview treating physicians *ex parte* — but *not without* the *patient's authorization.* The Reporter's Note to Rule 35 leaves no doubt that the intent of the Supreme Court in making the rule changes was to "safeguard . . . the confidential relationship between *a party* and his physician . . . ." Rule 35, ARCP (emphasis added).

One other serious matter must be addressed. The parties deposed Dr. James H. Golleher, who held a supervisory position over the hospital laboratory which, presumably, handled Danielle's blood sample and test results.[10] Dr. Golleher's deposition indicates that defendant's attorney, C.J. Hall, requested that Dr. Golleher not talk with Plaintiffs' attorney:

> Q (by plaintiffs attorney): And during that conversation [with Mr. Hall], you told Mr. Hall that I had requested to speak to you informally, and you had no objection to that. You told him that, didn't you?
>
> A: Yes.
>
> Q: And *Mr. Hall at that time indicated that he did have an objection to you [sic] speaking to me informally,* didn't he?

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[10] Dr. Golleher may be brought in as a defendant in this case. However, at the time of his deposition he indicated that he was an employee of AMI Central Arkansas General Hospital, thus immune from suit by terms of the settlement between the plaintiffs and the hospital.

A: If I remember right.

(Deposition of James H. Golleher, M.D., Exhibit A, Plaintiffs' Motion to Prohibit *Ex Parte* Communications).

Rule 3.4(f) of Model Rules of Professional Conduct plainly states:

> A lawyer shall not . . . request a person other than a client refrain from voluntarily giving relevant information to another party . . . .

Dr. Golleher was not Mr. Hall's client, and his request/suggestion was unethical.

The question for the Court is the appropriate sanction. Plaintiffs have submitted a recent order entered in a state malpractice action wherein Mr. Hall's partner was ordered to write a letter of retraction to a physician/witness whom he had instructed not to cooperate with a plaintiff's lawyer. Such a remedial measure would be ineffective at this point in this lawsuit. Yet the Court cannot ignore this serious violation of ethical rules.

Mr. Hall is hereby sanctioned in the amount of $2500 for this violation. Plaintiffs' motion to recover costs of deposing Dr. Golleher on the ground that the deposition was necessitated by defense counsel's misconduct is denied. In the context of a medical malpractice lawsuit, it is naive to suggest that information from a physician with knowledge of the case would be discovered only through informal interviews. Even if Dr. Golleher had talked with plaintiffs' counsel, that would not have obviated the taking of his deposition.

The plaintiffs have moved to continue the case in order to add an additional defendant. The motion is granted. The parties will necessarily resume discovery in this case. The Court is aware that the modest sanctions imposed against Mr. Hall will not "unring the bell"; it is difficult for a court to sanction impermissible attorney conduct without unduly penalizing the client. However, Dr. Lewis should not misinterpret the Court's leniency.

The sanctions imposed are intended to serve as a shot across the bow. Dr. Lewis, as well as all other parties and potential parties, are cautioned that any future misconduct by attorneys will result in substantial sanctions which will impact heavily upon the parties they represent.

Accordingly, the plaintiffs' Motion to Prohibit Unauthorized *Ex Parte* Communications with treating Physicians is granted; the plaintiffs' Motion for Continuance is granted; the plaintiffs' and defendant's Motions to Exclude Witnesses who were untimely identified are moot in light of the continuance; the plaintiffs' Motion to Strike the Answer of a person not yet a party is denied as premature. All other pending motions are moot, except the plaintiffs' motions to compel discovery. Those motions will be taken up in a separate order.

No. 92-1428EALR

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

WILLIAM HARLAN, ET AL.,
Appellees.

vs.

JAMES S. LEWIS, M.D.,
CALVIN J. HALL,
Appellants

The suggestion for rehearing en banc is denied.

The motion for rehearing has been denied by separate order of the panel.

February 26, 1993

Order entered at the Direction of the Court:

/s/ MICHAEL E. GANS

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court of the United States

No. A-858

CALVIN J. HALL,

Petitioner

v.

WILLIAM HARLAN, ET AL.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including June 25, 1993.

/s/ HARRY A. BLACKMUN
Associate Justice of the Supreme
Court of the United States

Dated this 13th
day of May, 1993.